Supreme Court, U.S.
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No. 96-599

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

THE GLENBROOK COMPANY,

Petitioner,

v.

ERNST HOME CENTER, INC.,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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15 pp

TABLE OF CONTENTS

		Page
STATEMENT OF THE CASE		1
REASONS FOR DENYING THE WRIT		5
I.	THE NINTH CIRCUIT'S DENIAL OF ATTORNEY FEES TO GLENBROOK UNDER ITS VOIDED OFFER OF JUDGMENT WAS CONSISTENT WITH SUPREME COURT AUTHORITY	5
II.	THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH AUTHORITY FROM OTHER COURTS OF APPEAL REGARDING OFFERS OF JUDGMENT	9
III.	GLENBROOK'S OFFER OF JUDGMENT WAS NOT BINDING	11
CONCLUSION		12

TABLE OF AUTHORITIES

Cases

Grosvenor v. Brienen,
801 F.2d 944 (7th Cir. 1986) 9,10

Marek v. Chesny,
473 U.S. 1, 87 L. Ed. 2d 1,
105 S. Ct. 3012 (1985) 6

Marryshow v. Flynn,
986 F.2d 689 (4th Cir. 1993) 9,10

Radecki v. Amoco Oil Co.,
858 F.2d 397, 403 (8th Cir. 1988) 11

Tanker Management, Inc. v. Brunson,
918 F.2d 1524 (11th Cir. 1990) 7,8

Statutes, Rules and Regulations

NRS 17.115 1,5,6,7,12

NRS 17.115(5) 6,7

F.S.A. § 45.061 8

F.S.A. § 768.79 7

Fed. R. Civ. P. 68 1,5,6,7,8,9,10,12

STATEMENT OF THE CASE

On May 7, 1992, Glenbrook sent Ernst an Offer of Judgment pursuant to Fed. R. Civ. P. 68 and NRS 17.115 in the sum of $210,000 "with costs incurred to date." Appendix to Petition for a Writ of Certiorari ("App.") 15a. By letter dated May 11, 1992, Glenbrook attempted to revoke and withdraw its Offer of Judgment. App. 36a.

On May 15, 1992, Ernst accepted Glenbrook's Offer of Judgment by signing and dating the very form drafted by Glenbrook without change, alteration or modification. App. 18a-24a. The form was subjoined to the Glenbrook Offer of Judgment. App. 16a. At the time of filing the acceptance of the Offer of Judgment with the court clerk, Ernst also gave notice of its intent to seek determination of attorney fees. App. 25a-28a.

On May 18, 1992, Glenbrook objected to Ernst's acceptance of the Offer of Judgment and moved to strike Ernst's acceptance on three grounds: First, Glenbrook reasserted it had revoked and withdrawn its Offer before

acceptance; second, Glenbrook claimed its Offer "was intended to be a compromise settlement with no attorneys' fees awardable"; third, Glenbrook asked the court to rescind the Offer if it found the Offer was not withdrawn and was otherwise binding. App. 29a-40a.

On appeal by Glenbrook from the District Court Magistrate's determination that Ernst's acceptance of the Offer was valid, Nevada District Court Judge Howard McKibben ruled that "the offer of settlement lacked mutual assent and was not binding." App. 42a.

Ernst relied upon this ruling and proceeded to trial, where it ultimately prevailed. App. 43a-61a. Glenbrook made no other offers of judgment after the District Court's ruling. App. 11a.

After trial, Glenbrook sought to recover its attorney fees pursuant to its May 7, 1992 Offer of Judgment. The District Court rejected Glenbrook's attempt:

> Glenbrook's contention that it is the prevailing party because it submitted an offer of judgment which was accepted is not

> supported by the evidence. The court had concluded that the offer of settlement was not binding. Glenbrook revoked the offer of judgment and represented that it had done so to the court. Glenbrook moved to strike Ernst's acceptance of the offer of judgment. It was necessary for this litigation to go forward because Glenbrook sought and received an order from this court that Glenbrook had revoked the offer of judgment upon which it now seeks to obtain attorneys' fees and costs.
>
> Therefore, the court finds that the provisions of NRS 17.115 are inapplicable and Ernst is entitled to its fees and costs and prejudgment interest.

App. 63a.

Glenbrook appealed the District Court's decision to the Ninth Circuit. The Ninth Circuit's initial Memorandum decision affirmed the denial of fees to Glenbrook on the same basis as the District Court:

> The district court properly denied Glenbrook's motion for fees and costs, rejecting the argument that Glenbrook was the prevailing party by virtue of having submitted an offer of judgment which Ernst accepted. The hearing on the offer of judgment resulted in both parties being released from the offer because it was not binding. Glenbrook made no further offers of judgment. The case proceeded to trial.

> Glenbrook cannot now claim that fee-shifting mechanisms apply to require Ernst to pay Glenbrook's costs and attorney's fees.

App. 11a.

Glenbrook thereafter submitted a Petition for Rehearing to the Ninth Circuit on the fee issue. Glenbrook argued that its should have been awarded fees because (1) Ernst failed to accept the Offer of Judgment, and (2) the District Court did not determine that the Offer itself was not binding, only that the parties were "released from having to comply with . . . the terms of any purported settlement that would have arisen from a valid acceptance of the offer of judgment." App. 84a.

In response to Glenbrook's Petition, the Ninth Circuit amended its Memorandum decision to state an alternate ground for affirming the District Court. The Ninth Circuit held that Glenbrook could not recover on its Offer in any event because Glenbrook was not the prevailing party. Following Supreme Court authority, the Ninth Circuit held that federal law regarding offers of judgment under Fed. R.

Civ. P. 68 rather than Nevada state law regarding offers under NRS 17.115 applied, and that under federal law, Ernst was the prevailing party. The Ninth Circuit also held that pursuant to the lease agreement which was the basis for this action, Ernst was entitled to recover its costs, including attorney fees. The Ninth Circuit therefore concluded that Ernst, not Glenbrook was the prevailing party for purposes of the Offer because Ernst's costs ($42,321.12) and fees ($83,445.95) through the date of Glenbrook's Offer together with the judgment it received ($175,617.75) exceeded Glenbrook's $210,000 Offer of Judgment. App. 74a-75a.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DENIAL OF ATTORNEY FEES TO GLENBROOK UNDER ITS VOIDED OFFER OF JUDGMENT WAS CONSISTENT WITH SUPREME COURT AUTHORITY.

In its Petition for a Writ of Certiorari ("Petition"), Glenbrook argues that the Ninth Circuit's affirmance conflicts with Supreme Court authority because it failed to

apply the substantive law of Nevada relating to attorney fees. Glenbrook argues that the Ninth Circuit improperly determined that NRS 17.115(5) conflicted with Rule 68, and therefore federal law regarding Rule 68 offers of judgment should apply.

NRS 17.115(5) provides that recoverable attorney fees and costs should not be added to a judgment in determining whether that judgment exceeds a prior offer of judgment. Under Rule 68, however, federal courts compare the amount of the offer against the judgment actually received plus costs accrued to the date of the offer, and if "costs" are defined to include attorney fees in the underlying action, then costs for purposes of Rule 68 will include attorney fees accrued through the date of the offer. See, e.g., Marek v. Chesny, 473 U.S. 1, 9-10 n.2, 87 L. Ed. 2d 1, 105 S. Ct. 3012 (1985).

Glenbrook contends that the Ninth Circuit erred in applying Rule 68 because the Rule "does not conflict" with NRS 17.115. See Petition, p. 15. Relying on the decision

in Tanker Management, Inc. v. Brunson, 918 F.2d 1524 (11th Cir. 1990), Glenbrook claims the provisions are not in "direct collision" because "NRS 117.15 concerns interest, attorney's fees, costs and offers of judgment, and Rule 68 concerns only costs and offers of judgment." See Petition, p. 16.

Glenbrook's argument is groundless. Rule 68 and NRS 17.115 obviously conflict; NRS 17.115(5) does not allow the addition of costs or attorney fees to a judgment in determining whether it exceeded an offer of judgment, while Rule 68 does. Glenbrook's comparison of the various topics addressed by the provisions is not even remotely germane.

Glenbrook's reliance on Tanker is equally groundless. In Tanker, the Eleventh Circuit determined that the prevailing defendant was not entitled to recover fees and costs under its offer of judgment because both Rule 68 and Florida law (F.S.A. § 768.79) require a plaintiff to recover some judgment, and judgment in that case was entered in

favor of the defendant. Tanker, 918 F.2d at 1527. The Eleventh Circuit determined, however, that the defendant could recover fees and costs pursuant to the "offer of settlement" it made under a different provision, F.S.A. § 45.061, which provides that a prevailing defendant may recover its attorney fees if the plaintiff unreasonably rejects an offer of settlement. The Court rejected the plaintiff's argument that F.S.A. § 45.061 was preempted by Rule 68. According to the Court, "[b]ecause Rule 68 applies only to offers of judgment and is in no way applicable to settlement offers as provided in § 45.061, Rule 68 does not preempt state law." Tanker, at 1528-29. Given that recovery in this case involves conflicting provisions concerning offers of judgment, the decision in Tanker has no bearing whatsoever on this case.

The Ninth Circuit's decision, therefore, was entirely consistent with Supreme Court authority.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH AUTHORITY FROM OTHER COURTS OF APPEAL REGARDING OFFERS OF JUDGMENT.

Glenbrook's Petition also contends that the Ninth Circuit's decision is in direct conflict with decisions of other circuits. Glenbrook claims the Ninth Circuit should have compared its Offer of Judgment plus costs accrued to the date of the Offer against the amount of the trial judgment plus costs accrued to the date of the Offer. In support of its argument, Glenbrook cites Marryshow v. Flynn, 986 F.2d 689 (4th Cir. 1993), and Grosvenor v. Brienen, 801 F.2d 944 (7th Cir. 1986). See Petition, p. 18.

Glenbrook's alternate argument is also groundless. First, the interpretation of Rule 68 urged by Glenbrook is nonsensical; adding the same amount of pre-offer costs to an offer of judgment and to a trial judgment before comparing the two would be pointless because such a step would never change the comparison.

Second, the cases cited by Glenbrook do not support its interpretation. In Marryshow, for example, the Fourth

Circuit determined that defendants in a civil rights action were not entitled to recover their fees or costs under Rule 68 because their $20,000 offer of judgment did not exceed the verdict obtained by the plaintiff ($14,500) plus the plaintiff's pre-offer attorney fees ($11,800). Marryshow, 986 F.2d at 692.

And in Grosvenor, the Seventh Circuit similarly determined that defendants in a civil rights action were not entitled to recover their fees and costs under Rule 68 because their $7,500 offer of judgment did not exceed the verdict obtained by the plaintiff ($7,001) plus the plaintiff's pre-offer costs and fees ($7,862.09). Grosvenor, 801 F.2d at 945, 948.

In neither Marryshow nor Grosvenor did the other Courts of Appeal add pre-offer costs or fees to the offer of judgment. The Ninth Circuit's decision was therefore entirely consistent with the decisions from other Courts of Appeal.

III. GLENBROOK'S OFFER OF JUDGMENT WAS NOT BINDING.

Even if the Ninth Circuit somehow erred in construing the law, its affirmance was nevertheless correct. As the District Court originally noted, and the Ninth Circuit found in its initial Memorandum decision, Glenbrook sought and received a determination that its Offer of Judgment was "not binding." App. 11a, 42a,

Both parties were therefore released from the Offer, and it cannot now be used as a grounds for recovery. As the Eighth Circuit noted in Radecki v. Amoco Oil Co., 858 F.2d 397 (8th Cir. 1988):

> We cannot hold the parties to a contract they never made. It therefore will be necessary for the parties to approach the settlement question anew. In addition, because of the unusual circumstances of this case, and the uncertainty of Radecki as to the legal effect of his post-clarification purported acceptance of Amoco's November 18 offer, we hold that the November offers have not made the cost-shifting mechanism of Rule 68 operative.

Radecki, at 403.

Regardless of the Ninth Circuit's conclusions regarding Rule 68 and NRS 17.115, therefore, its affirmance of the District Court's denial of Glenbrook's request for fees was entirely proper.

CONCLUSION

For the reasons stated above, Glenbrook's Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 15th day of November, 1996.

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